

**Objection to the Denial of ELF Claim No. 9611125,  
Circle K Mini Mart, Greenfield, Indiana.  
2000 OEA 75 (00-F-J-2475)**

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**TOPICS:**

summary judgment  
Excess Liability Trust Fund, ELF, ELTF  
land farm  
denial  
resubmission  
waived  
administrative review  
materially different  
second application  
IC 13-23-9-2(d)  
directory  
mandatory

**PRESIDING JUDGE:**

Lasley

**PARTY REPRESENTATIVES:**

Petitioner: Deborah Albright, Esq.: Monday Rodeheffer Jones & Albright  
IDEM: Robert Keene, Esq.

**ORDER ISSUED:**

December 6, 2000

**INDEX CATEGORY:**

Land

**FURTHER CASE ACTIVITY:**

[none]

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STATE OF INDIANA            )  
                                       )  
COUNTY OF MARION         )

BEFORE THE INDIANA OFFICE OF  
SS: ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: )  
 )  
 )  
OBJECTION TO THE DENIAL OF )  
ELF CLAIM NO. 9611125 ) CAUSE NO. 00-F-J-2475  
CIRCLE K MINI MART )  
GREENFIELD, INDIANA )

### I. Statement of the Case:

## II. Issue:

Whether Circle K timely appealed the denial of ELF reimbursement.

### III. Undisputed Facts:

The Environmental Law Judge finds the following facts undisputed:

1. Circle K owns and operates a facility located in Greenfield, Indiana.
2. On July 8, 1999, Circle K filed an ELF application with IDEM in the amount of \$57,887.15, which represents the costs it incurred remediating petroleum contamination from its underground storage tanks.
3. On September 17, 1999, IDEM denied Circle K's claim. It found only \$28,334.44 of Circle K's costs eligible for 75% reimbursement. This meant that Circle K could receive reimbursement of \$21,250.83. IDEM also found that some of Circle K's invoices were not eligible for reimbursement because "costs incurred in association with building a land farm will not be reimbursed due to non-compliance. . . ." Those costs disallowed totaled \$7,448.79.
4. Circle K did not receive reimbursement from the first application because it did not meet the \$35,000.00 deductible.

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5. On January 12, 2000, IDEM received a second application for reimbursement from Circle K in the amount of \$7,448.79.
6. IDEM denied the second application for reimbursement on February 4, 2000. In the cost review summary attached to the denial letter, IDEM indicated that the costs were not eligible for reimbursement because “they have been fully reimbursed in the original claim.”
7. Circle K appealed that denial on February 21, 2000.
8. Circle K has not received reimbursement from either its first application or its second application.
9. Circle K had its Corrective Action Plan (CAP) approved on August 12, 1999. The CAP was approved again on December 8, 1999.

**IV. Discussion:**

IDEM moves for summary judgment on the basis that Circle K waived its right to administrative review of IDEM’s September 17, 2000 denial. IDEM contends Circle K had the right to appeal the decision to disallow certain costs. Since Circle K did not file an appeal, it is collaterally estopped from appealing them now. Furthermore, Circle K should not be allowed to circumvent the appeals procedures by simply filing a second application for the same costs disallowed in its first application.

Circle K moves for summary judgment because IDEM gave an invalid reason for denying its second ELF application. Circle K never received reimbursement from the fund. Since the law requires the administrator of the fund to give all of the reasons for the denial, Circle K should be eligible to collect reimbursement because IDEM gave an invalid reason for its denial.

For the following reasons IDEM’s motion must be granted and Circle K’s motion must be denied. Generally, on a motion for summary judgment, the moving party bears the burden of proving that no issue of material fact exists. And, a defendant seeking summary judgment must set forth specific facts that negate the plaintiff’s claim. McCullough v. Allen, 449 N.E.2d 1168, 1171 (Ind.Ct.App. 1983). IDEM presented specific facts demonstrating that Circle K unjustifiably submitted the exact same costs for reimbursement in its second ELF application. On the other hand, Circle K did not present evidence of changed circumstances warranting a reconsideration of the first denial, which would overcome IDEM’s evidence. Circle K cannot prevail on its motion because it presumes that since IDEM made a mistake in its denial letter, Circle K is automatically eligible to receive reimbursement from the ELF.

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*A. Circle K waived its right to administrative review.*

IDEM correctly argues that Circle K has waived its right to administrative review. The September 17, 2000 denial letter specifically states: “You may resubmit an application for those items that were disallowed for lack of backup documentation.” Here, Circle K does not argue that its second application was based on submitting backup documentation for disallowed costs. Rather, it simply resubmitted the same information regarding the land farm, which IDEM had already considered and disallowed. If, on the other hand, Circle K presented IDEM with evidence that it corrected any problems with the land farm in its second application, IDEM could presumably approve the costs. This approach of denying a claim that is not properly documented or implemented and then approving a second claim providing the necessary documents or corrections, comports with the practice observed by Kim Forster in his affidavit. See Exhibit 1, Petitioner’s Motion for Summary Judgment. The Forster Affidavit, however, does not allege Circle K corrected problems with the land farm. Instead, it suggests that its second CAP approval warranted a second ELF application. This tribunal, however, does not know whether the second CAP approval related to the land farm or not. If so, it should have been reflected in the second ELF application. And, the affidavit does not shed any light on the topic. In order to overcome IDEM’s motion for summary judgment, Circle K must allege specific facts showing a genuine issue for trial. Medical Disposal Services v. IDEM, 669 N.E.2d 1054, 1056 (Ind.Ct.App. 1996). It is reasonable for this tribunal to expect that Circle K would tie the second CAP approval to the disallowed land farm costs.

The Indiana Court of Appeals in BOFFO v. Boone County Board of Zoning Appeals, 421 N.E.2d 1119 (Ind.Ct.App. 1981), required the petitioner to demonstrate a nexus between the reason for the denial and the second application. In that case, a board of zoning appeals was requested to reconsider its denial of a variance because of changed circumstances. The opinion of the court was that the board could only reconsider a prior denial if the current petition for a zoning variance is materially different from the petition denied. The court made a special point of noting “it is not any changed circumstance or condition which will authorize subsequent reconsideration. It must be a change in the particular circumstance or condition which induced the prior denial.” *Id.* at 1127. Similarly, it was incumbent upon Circle K to present evidence the second CAP approval directly related to the land farm issue because IDEM disallowed its costs on that basis. Since there is no evidence on the record that the second application was “materially different” from the first application, Circle K waived its right to administrative review by not appealing the denial of its first application.

*B. Citing an incorrect denial does not amount to eligibility for Circle K*

IDEM citing a different, incorrect denial basis for the second ELF application does not mean retribution for Circle K. It is undisputed by both parties that Circle K did not receive reimbursement for any of its claims. Even though IDEM cited full reimbursement as a reason for denying the second application, this simply cannot lead to the conclusion that Circle K is now eligible to receive reimbursement. First, since the reason for denial of the second application is not true, IDEM, in essence, has failed to give any reason at all for denying the second application. While it is true the law requires the administrator to give all of the reasons for the

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denial in the denial letter, a failure to do so does not mean a party is automatically eligible to receive reimbursement. Indiana Code § 13-23-9-2(d) does not provide for consequences if the administrator fails to provide all reasons for the denial. Courts presented with this issue in the past have held that the word “shall” in such a case is directory rather than mandatory. *See Civil Rights Commission v. Indianapolis Newspapers, Inc.*, 702 N.E.2d370, 376 (Ind.Ct.App. 1998) (“the term ‘shall’ has often been held to be directory in cases where the statute fails to specify adverse consequences. . . .”); and *In the Matter of Middlefork Watershed Conservancy District*, 508 N.E.2d 574, 576 (Ind.Ct.App. 1987) (“shall’ may be construed as directory instead of mandatory to prevent the defeat of the legislative intent.”) Here, the legislature intended that only those who meet the eligibility requirements will receive reimbursement from the ELF. There are no adverse consequences specified if the administrator fails to give all the reasons for the denial or the wrong reason for denial. In other words, the statute does not provide for default eligibility. Second, even if Circle K’s statutory interpretation were accepted, it still would not be eligible because it has not met the statutorily required deductible of \$35,000.00. Circle K does not contradict IDEM’s assessment that it would be reimbursed 75% of its eligible costs. The first application determined Circle K had \$28, 334.44 of eligible costs. If \$7,448.79 is added to that amount, the total would be \$35,783.23. Thus, 75% of \$35,783 .23 is \$26,837.42. So, Circle K is still short of its deductible and would not have received reimbursement anyway.

**V. Conclusion of Law:**

The Environmental Law Judge concludes, as a matter of law, that Circle K is ineligible to receive reimbursement because it failed to appeal timely the September 17, 1999 denial letter as set forth in Ind. Code § 13-23-9-4.

**VI. Order:**

IDEM’s Motion for Summary Judgment is hereby **GRANTED**, Circle K’s Motion for Summary Judgment is hereby **DENIED** and Circle K’s Petition for Administrative Review is hereby **DISMISSED** for lack of jurisdiction. The final hearing currently set for December 14, 2000, is hereby **VACATED**.

You are further notified that pursuant to IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative review of decisions of the Commissioner of IDEM. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-2 1.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED** in Indianapolis, Indiana this 6th day of December 2000.

Linda C. Lasley  
Environmental Law Judge